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Supreme Court of the United States

OCTOBER TERM, 1962

No. 138

JOHN MOODY, SR. and WILLIAM MURPHY,

Petitioners,

vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 1107

JOHN MOODY, SR. and WILLIAM MURPHY,

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vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Petitioners herein (William Murphy and John Moody, Sr.) seek a writ of certiorari to review a judgment of the Supreme Court of New Jersey, affirming contempt judgments of the Superior Court of New Jersey only insofar as such judgments adjudged petitioners guilty of civil contempt and ordered petitioners incarcerated until they answered certain specified questions and until they paid a fine of $50 each. The Supreme Court of New Jersey reversed these contempt judgments with directions for a

new trial insofar as such judgments adjudged petitioners guilty of criminal contempt and sentenced petitioners to thirty days in jail.

The facts are as follows. The American Export Lines, Inc., which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the port of New York, including Hoboken. The employment of Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, Markley was an investigator for the Waterfront Commission and his principal assignment was to cover said piers and terminals of American Export Lines, Inc., in Hoboken. (Petitioners' printed Appendix in the court below, p. 6a)

On Monday, May 16, 1960, when the employment of Markley for American Export Lines commenced as aforesaid, a work stoppage began of the longshoremen and checkers employed by the American Export Lines in Hoboken, New Jersey. This work stoppage, except for the morning of Tuesday, May 17, 1960, continued through Friday, May 20, 1960. The work stoppage was in effect during the times that Markley, pursuant to his duties, was on the piers of the American Export Lines. Since May 20, 1960, when the work stoppage ended, Markley has not set foot on the piers of American Export Lines in Hoboken. (App., p. 6a)

Under the Waterfront Commission Act, the longshoremen and checkers who participated in this work stoppage were required to be and are registered by the Waterfront Commission. Also, under the Waterfront Commission Act, Markley, as Chief Security Officer of American Export Lines, must be and is licensed by the Waterfront Commission as a port watchman. (App., p. 6a)

The Commission instituted the instant investigation to determine whether the purpose of the work stoppage was

illegally to coerce an employer (the American Export Lines) to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and further to determine whether any persons registered or licensed by the Commission were violating any provision of the Waterfront Commission Act by participating in such illegal coercion. (App., p. 7a).

In connection with such investigation, subpoenas of the Commission were duly served on May 18, 1960 upon petitioner William Murphy, the business agent of Local No. 2 of the International Longshoremen's Association, representing longshoremen in Hoboken, New Jersey, and upon petitioner John Moody, Sr., organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Commission in response to these subpoenas on the afternoon of May 19, 1960. (App., p. 7a)

Moody, after giving his name and address, testified that he was a union official and refused to answer any other questions. Murphy testified that he was business agent of Local No. 2 and represented members of his local working at the American Export Piers in Hoboken. He stated that he knew the pier did not work on Monday [May 16, 1960] and that it was common knowledge for the previous ten days that things were not normal at Piers A, B, and C, Hoboken [American Export Lines Piers]. Murphy then refused to answer whether this condition was related to the appointment of Markley as Chief Security Officer and refused to answer any further questions. (App., p. 7a)

Thereupon, the Commission instituted contempt proceedings in the Superior Court of New Jersey, Hudson County, which, by judgment dated June 20, 1960, adjudged Murphy and Moody guilty of civil contempt and ordered that they be fined $50 each and that they be incarcerated until they obeyed the Commission subpoenas. (App., p. 8a) The judgment of contempt against Murphy and Moody was affirmed on May 22, 1961 by the Supreme Court of New

Jersey and this Court dismissed petitioners' appeal and denied their petition for certiorari. *In re Application of Waterfront Commission*, 35 N. J. 62 (1961), appeal dism'd and cert. den., 368 U. S. 32.

In their appearance before the Commission in May, 1960, both Moody and Murphy specifically stated that they were not refusing to testify upon the ground of self-incrimination. (p. 8a) Rather, as reflected in the opinion of the Supreme Court of New Jersey (35 N. J. 62; Petition, pp. 65a-80a), petitioners argued in the courts that the Commission's investigation was unlawful and unauthorized because it allegedly was violative of the lawful right to strike and because it allegedly was also in conflict with and therefore preempted by the federal Labor Management Relations Act.

Upon remand, petitioners, despite the affirmance of the civil contempt judgment, persisted in their refusal to testify, now claiming for the first time, among numerous other grounds, the privilege against self-incrimination. (App., p. 9a) The Superior Court held that petitioners had purged themselves of contempt by invoking the privilege; however, the Superior Court further ruled that the Commission's subpoenas were still in force and effect and directed petitioners to appear at the offices of the Commission pursuant to the subpoenas. (App., pp. 11a-12a) Pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act (N.J.S.A. 32: 23-86; App., pp. 10a-11a), the Commission conferred petitioners with immunity from prosecution and directed them to testify. (App., p. 12a) Notwithstanding such grant of immunity from prosecution, petitioners again refused to testify upon multifarious grounds, one of which was that the Commission's grant of immunity extended only to state, and not to federal, crimes. (App., pp. 74a-75a, 96a-97a)

The Commission thereupon instituted the second and instant contempt proceeding against petitioners to have

them adjudged in both civil and criminal contempt. By judgments filed December 4, 1961, the Superior Court of New Jersey adjudged petitioners to be guilty of both civil and criminal contempt. The judgments ordered that the petitioners be incarcerated until they answer certain questions specified in the judgments and further fined defendants $50 each and sentenced defendants to 30 days in jail. (App., pp. 250a-257a) Upon appeal, the Supreme Court of New Jersey affirmed these second contempt judgments insofar as they held petitioners guilty of civil contempt and reversed the contempt judgments insofar as they held petitioners guilty of criminal contempt upon the ground that the Superior Court should not have denied petitioners the opportunity to present evidence upon the question of their criminal contempt. (Pet., pp. 35a, 97a-98a)

REASONS FOR DENYING THE WRIT

I

Petitioners did not have a constitutional right to refuse to testify upon the ground that the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes.

1. Petitioners assert that they had a constitutional right to refuse to testify in the Commission's investigation because the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes. Section 5-b(5) of the Waterfront Commission Act, pursuant to which petitioners were granted immunity from prosecution (Pet., pp. 109a-110a), was enacted in 1956 in New Jersey (1956 Laws of New Jersey, c. 194) and in 1957 in New York (1957 Laws of New York, c. 188) and is expressly patterned after, and substantially identical to, Section 2447 of the New York Penal Law. (See Commission's Legislative Memorandum, McKinney's 1957 Session

Laws of New York, p. 2053.) In *Knapp* v. *Schweitzer*, 357 U. S. 371, this Court sustained the constitutional validity of the grant of immunity from prosecution pursuant to Section 2447 of the New York Penal Law against the same contention, as here, that no immunity from federal prosecution had been conferred. Hence, petitioners in effect request this Court to review the selfsame statute and question as were recently involved in *Knapp*.

Petitioners recognize that *Knapp* stands foursquare against them. Petitioners contend, however, that this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643, presages the overruling of *Feldman* v. *United States*, 322 U. S. 487 (permitting use in a federal criminal trial of evidence obtained pursuant to a state grant of immunity), and that the overruling of *Feldman* foreshadows, in turn, the demise of *Knapp*. But even assuming for the purposes of discussion the possible overruling of *Feldman*, which is one of the links in petitioners' highly attenuated argument, this would militate against, rather than for, the grant of certiorari here. For in such event a witness could not claim fear of federal prosecution as a basis for his refusal to testify. Further, the question in *Feldman* is not even involved here. The time to reach that question is *when and if* petitioners' testimony is used against them in a subsequent federal prosecution.

2. As a reason for issuance of certiorari herein, petitioners assert throughout the petition that there was cooperation between the Commission and federal agencies in the instant investigation. (Pet., pp. 4-5, 21-22) However, this is no more than an *ipse dixit* by petitioners, for there is nothing in the record whatsoever to support these completely conclusory and unsupported assertions of such cooperation. Here, as in *Knapp*, "the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation". (357 U. S. 371, 380) There is not involved herein any of the numerous

elements of federal-state cooperation which were present in *Mills* v. *State of Louisiana*, 360 U. S. 230, where, notwithstanding such cooperation, this Court sustained the state grant of immunity from state prosecution. Indeed, there is not even present here, as there was in *Knapp*, the fact "that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law [involved therein]". (357 U. S. 371, 380)

Nor does it lie in petitioners' mouths to claim that the denial of their motion for discovery prevented them from proving the possible existence of cooperation between the Commission and federal agencies. Plainly, a witness in a state investigation has no federal right to fish through the files of the state investigating agency, and to interrogate state officials, in the hope that perhaps he may happen upon some evidence of such cooperation.

3. Another basis for petitioners' claim that it was constitutionally required to grant them immunity from federal prosecution is the contention in effect that the Commission, for present purposes, is a federal agency because it was created by an interstate compact approved by Congress. (Pet., p. 22) However, beyond the granting of consent to the original Compact, the federal government has had no part whatever in the creation, maintenance or operation of the Commission. In fact, Congress, in approving the Compact, expressly gave its approval to supplementary *state* legislation in accord with the objectives of the Compact (Act of August 12, 1953, 67 Stat. 541, c. 407), a "provision in the consent by Congress to a compact . . . so extraordinary as to be unique in the history of compacts", *DeVeau* v. *Braisted*, 363 U. S. 144, 154.

The law in any event is established that Congressional consent to an interstate compact does not constitute the

agency created thereunder a federal instrumentality. E.g., *Hinderlider* v. *La Plata River Co.*, 304 U. S. 92 (interstate compact not a treaty or statute of United States within meaning of statute defining this Court's appellate jurisdiction); *Commissioner* v. *Shamberg's Estate*, 144 F.2d 998 (2nd Cir. 1944), *cert. den.*, 323 U. S. 792. (Port of New York Authority is a "political subdivision" of States of New York and New Jersey within meaning of Revenue Act excluding from taxation the interest on obligations of a state or political subdivision thereof.) And see this Court's decision this Term in *Cleary* v. *Bolger*, 371 U. S. 392, wherein an investigator for the Commission was held without discussion to be a state officer thereby rejecting, *sub silentio*, exactly the same argument as that now made by petitioners.

II.

Moreover, this is a singularly inappropriate case in which to consider a claim of federal incrimination upon a grant of state immunity because here that issue is seriously complicated by questions of waiver, estoppel and reasonableness.

1. As noted, in their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming the privilege against self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was actually protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face*, proceeded to claim the privilege against the self-incrimination.

The court below rejected the Commission's contention that petitioners had waived the privilege against self-incrimination. The court below held that this contention was not available to the Commission because the Commission had not made this objection in the court of first instance (the Superior Court) and further that the Commission had recognized petitioners' right to claim the privilege. (Pet., p. 13a)

This decision by the court below is of course not conclusive here. For the Commission, as the respondent herein, may—and would upon a grant of certiorari—urge any ground that appears in the record in support of the judgment herein. E.g., *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435-436; *Langnes* v. *Green*, 282 U. S. 531, 538-539. An "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Ry. Express Co., supra*, at page 435. Indeed, this Court has entertained an argument in support of the judgment that was made for the first time upon oral argument in this Court. *Marshall* v. *Pletz*, 317 U. S. 383, 389-390.

Further, the question of waiver is itself a federal question cognizable by this Court. For "This Court will review or independently determine all questions on which a federal right is necessarily dependent." *United States* v. *Pink*, 315 U. S. 203, 217. E.g., *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (whether patent licensee is estopped from challenging price fixing clause in agreement as being invalid under the Sherman Anti-Trust Act is a federal question). Plainly, the question of when and in what circumstances a claim of federal incrimination based upon the United States Constitution may be asserted is a

question that requires uniform treatment and cannot properly be subject to the vagaries of local law.

And while we shall not burden this brief in opposition with an argument *in extenso* upon the point, a review of the record herein will show that the Commission never recognized a right in petitioners to assert a claim of *federal* incrimination. The Commission did recognize during petitioners' first appearance upon the remand that petitioners could claim the privilege against self-incrimination, there being at that time no explicit claim by petitioners that they feared federal incrimination, and the Commission adjourned the investigation for the purpose of determining whether to obviate the plea by granting petitioners immunity from *state* prosecution. (App., pp. 29a-33a, 36a, 43a-52a) Subsequently, the Commission did confer immunity upon petitioners and when petitioners indicated for the first time that they were relying upon federal incrimination, the Commission specifically advised petitioners that the grant of immunity did not extend to federal crimes (App., pp. 74a-75a; 96a-97a) and that they would be subject to contempt proceedings for their refusal to testify. (App. pp. 91a, 103a) The Commission accordingly never recognized a claim of *federal* incrimination by petitioners as a valid plea.

2. In addition to having waived the privilege against self-incrimination, petitioners are estopped from claiming the privilege. As noted, petitioners contested the first contempt proceedings against them upon the ground that not only was their conduct innocent and lawful but that the Commission's investigation could not be sustained because it interfered with conduct affirmatively protected by federal labor legislation. In their brief (p. 3) in the court below, petitioners represented:

"During the period commencing May 16 and ending May 25, 1960, the Commission does not allege, nor

> were there any acts of violence committed; there were no picket, picketing, or demonstrations; no person was assaulted or intimidated; no crimes were committed; no property was damaged; the streets were not blocked or obstructed and traffic in and out of the piers was not impeded."

The court below, however, ruled against the Commission on the question of estoppel upon the ground that the Commission had not asserted this objection in the court of first instance, that is, the Superior Court. (Pet., p. 13a)

However that may be and entirely apart from what happened below, petitioners are estopped *in this Court* from claiming federal incrimination. For in the Jurisdictional Statement (pp. 22-23) filed by petitioners with this Court in the first contempt proceeding, petitioners represented:

> "The question here presented, as to the constitutionality of the Compact as construed and applied in the decision below, is substantial, then, in the most weighty degree. The question is not governed by the DeVeau case [*DeVeau* v. *Braisted,* 363 U. S. 144], as above shown, for here there is not brought into play, either factually or analytically, the direct crime-prevention features which were decisive in DeVeau; here, rather, the whole realistic brunt of the state police power is upon a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a 'crime' element."

Having sought review in this Court upon the ground that the Commission was interfering with "a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a 'crime' element", petitioners are now estopped from seeking review in this Court upon ground that they fear federal incrimination. Cf. *National Association for the Advance-*

ment of Colored People v. *Alabama*, 360 U. S. 240 (in contempt proceeding against NAACP, where this Court's prior decision was based on premise that NAACP had complied with court order to produce documents except as to its membership lists, which was not denied by the State of Alabama, the State of Alabama was bound by this position and could not subsequently claim that the NAACP had failed in other respects to comply with the court order). *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510, 512-13 (3rd Cir. 1953), (railroad employee who received large settlement after personal injury trial in which he claimed permanent disablement was estopped from subsequently suing for reinstatement to his job with railroad).

3. Further, there is no reasonable basis for petitioners' claim that they fear federal incrimination. The Superior Court, who saw and heard petitioners testify on the question of their claimed fear of federal incrimination, expressed doubts as to the sincerity of petitioners' claimed fear. (Pet., p. 11a) However, the court below (the Supreme Court) stated that it was unnecessary to decide this question in view of its conclusion that the plea of federal incrimination was not legally available to petitioners. (Pet., p. 25a)

Again, this is a ground which the Commission may assert in this Court in support of the instant judgments and this issue is itself a federal question cognizable by this Court. Petitioners' claim that they fear federal incrimination does not of course bind anyone. The "protection [the privilege against self-incrimination] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 1917, 244 U. S. 362, 365, 37 S. Ct. 621, 622, 61 L. Ed. 1198, and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he

would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 1951, 340 U. S. 367, 71 S. Ct. 438, and to require him to answer it if 'it clearly appears to the court that he is mistaken'. Temple v. Commonwealth, 1880, 75 Va. 892, 899." *Hoffman* v. *United States*, 341 U. S. 479, 486. Here, as the record makes clear, petitioners have been something less than completely candid in their claims in these contempt proceedings.

Petitioners assert that they fear incrimination under federal statutes punishing theft from interstate commerce. Certainly, it taxes credulity that a work stoppage to prevent a certain person from becoming the Chief Security Officer of the American Export Lines in the port of New York was instituted simply in order to commit a theft. Petitioners also claim that they fear incrimination under such federal statutes as the Civil Rights Law, the Anti-Trust Laws, and the Hobbs Anti-Racketeering Act. These statutes are clearly inapplicable to the instant facts on their face. Moreover, at least some of these statutes are mutually exclusive; it is difficult to conceive, to say the least, how petitioners can honestly fear incrimination under both a federal law prohibiting theft from interstate commerce or extortion and the Anti-Trust Laws. Plainly, in this litigation, petitioners are simply thrashing about for a federal statute upon which they can hang their claim of federal incrimination without regard whatever for the truth.

4. Petitioners seek certiorari mainly upon the contention that they had a constitutional right to refuse to testify because the Commission's grant of immunity did not extend to federal crimes. But before this issue is even reached, substantial questions involving waiver, estoppel and the reasonableness of the claimed fear of federal in-

crimination must first be decided. These complicating questions make this case singularly inappropriate for consideration upon certiorari.

III

Petitioners' subsidiary contentions respecting the within civil contempt judgments (that they were entitled to a jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission's files; and that they were denied the equal protection of the laws) are plainly unsubstantial.

In addition to petitioners' main contention that they had a constitutional right to refuse to testify because the Commission's grant of immunity did not extend to federal crimes, petitioners make several subsidiary contentions in support of their petition for certiorari. These subsidiary contentions are plainly unsubstantial.

1. Petitioners contend that, before they could be adjudged guilty of civil contempt, it was constitutionally required that they be given a jury trial. (Pet., pp. 6, 26) In *Green* v. *United States*, 356 U. S. 165, 183, sustaining a *federal criminal* contempt conviction in the absence of trial by jury, this Court stated: "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." It accordingly cannot be reasonably contended that jury trials are constitutionally required in *state civil* contempts.

2. Petitioners contend that they were entitled to a trial upon the issue of their good faith. (Pet., p. 26) Petitioners assert that "they had no contemptuous intent and that

their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal considerations". (Pet., p. 5) Conclusively against petitioners, however, is this Court's decision in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, where it was held that good faith is not a defense in a federal civil contempt proceeding for violation of an injunction order. Indeed, this Court has held that the only intent at issue in a criminal prosecution for contempt of Congress, pursuant to 2 U.S.C., § 192, making it a misdemeanor "willfully" to refuse to answer questions or to produce papers, is whether such refusal to obey was deliberate, that is, not inadvertent. *Sinclair* v. *United States*, 279 U. S. 263, 299 (good faith reliance upon advice of competent counsel not a defense since moral turpitude is not involved). Here, of course, petitioners' refusal to testify was deliberate. Besides, petitioners, who are free on bond pending this Court's decision, may at any time purge themselves of civil contempt by testifying and it is difficult to see what good faith claim petitioners could make for continuing in their refusal to testify if this Court should refuse review.

3. Petitioners contend that they were unable to make a rational judgment with respect to the necessity and advisability of claiming the privilege against self-incrimination without being apprised of "the Commission's damaging information against them (if any) and [without] confrontation and cross-examination of accusatory witnesses". (Pet., p. 6) This surely is a novel contention. As the court below cogently stated respecting this argument: "We know of no rule, constitutional or otherwise, which provides that when, as here, the subject matter of the inquiry and the pertinency thereto of questions have been made clear to a witness, he is entitled to be given further information before deciding whether to exercise his privilege against self-incrimination. If the Commission were thus compelled to disclose the contents of its files, then the

whole investigative process would be subject to scrutiny before the investigation had even gotten under way, and in most cases the investigation would be thwarted". (Pet., p. 33a) And in this Court's decision in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 213, which rejected the argument that a hearing on the question of coverage was necessary before judicial enforcement of subpoenas in an administrative investigation of violations of the Fair Labor Standards Act, the Court stated: "[This] view if accepted would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designedly avowed to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him."

4. Finally, one of the questions tendered by the instant petition for certiorari is whether petitioners were discriminatorily denied, in violation of the equal protection of the law, the benefits of the New Jersey statute defining the privilege against self-incrimination to include federal crimes. (Pet., pp. 6, 114a) The court below held as a matter of general statutory construction that this statute, which was recently enacted in 1960, was not intended to be applicable in a situation where, as here, the witness had been granted immunity pursuant to the explicit immunity provisions of the Waterfront Commission Act. Since this decision involves a question of general statutory construction which will have uniform application, and is in no wise confined to petitioners, no question of the equal protection of the law is presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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